

***United States Court of Appeals  
for the Second Circuit***



**RESPONDENT'S  
BRIEF**





76 - 4151  
76 - 4153

BRIEF FOR RESPONDENT FEDERAL POWER COMMISSION

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

Greene County Planning Board, et al.  
Town of Durham, et al.

Petitioners.

v.

Federal Power Commission,  
Respondent,  
Power Authority of the State of New York,  
United Brotherhood of Electrical Workers Local 1249,  
Intervenors.

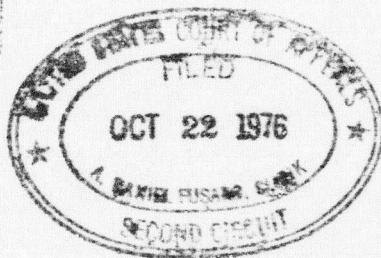
ON PETITIONS TO REVIEW ORDERS OF THE FEDERAL POWER COMMISSION

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OCTOBER 18, 1976

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On Petitions To Review Orders  
Of The Federal Power Commission

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STATEMENT OF THE ISSUES

1. Whether the Presiding Administrative Law Judge compiled a full record while affording Greene County a fair and complete hearing.
2. Whether substantial record evidence establishes the need for the Gilboa-Leeds line.
3. Whether the Commission properly determined that the record should not be reopened.
4. Whether the scope of the Commission's consideration in this licensing proceeding was proper.



5. Whether the Commission's Environmental Impact Statement is adequate.

6. Whether the Petitioners are entitled to an award of expenses associated with this litigation.

REFERENCE TO RULINGS

Under review herein are three Commission orders issued in Power Authority of the State of New York, Project No.

2685: Opinion No. 751, "Opinion And Order Affirming And Adopting Initial Decision Authorizing Construction Of Proposed Gilboa-Leeds Transmission Line," issued January 29, 1976; Opinion No. 751-A, "Opinion And Order Denying Rehearing, Reopening And Stay," issued April 27, 1976; and "Order Denying Rehearing With Respect To Reopening And Stay," issued June 7, 1976.

Previous decisions by this Court relating to this case are: Greene County Planning Board, et al. v. F.P.C., 455 F.2d 412 (Greene County I); Greene County Planning Board, et al. v. F.P.C., 490 F.2d 256 (Greene County II); and Greene County Planning Board v. F.P.C., 528 F.2d 38 (Greene County III).



STATEMENT OF THE CASE

This proceeding began with the filing on August 15, 1968 by the Power Authority of the State of New York (PASNY) of an application for a license under Section 4(e) of the Federal Power Act (Act), 16 U.S.C. §797(e), for the Blenheim-Gilboa Pumped Storage Project, designated FPC Project No. 2685. This one million kilowatt capacity project was to be located on the Schoharie Creek, a tributary of the Mohawk River, in the Towns of Blenheim and Gilboa, in Schoharie County, New York, and was to consist of an upper and lower reservoir, tunnels, powerhouse, substation, switchyard and appurtenant electrical facilities.

On June 6, 1969, the Commission granted a license to PASNY for Project No. 2685 (41 FPC 712). Therein the Commission noted that Sheet 7 of Exhibit L (FPC No. 2685-10) as well as Sheet 2 of Exhibit J (FPC No. 2685-2) of the application for license reflect three 345 kv transmission lines that will be used as primary project lines to connect to existing interconnected primary transmission systems of certain designated New York State public utilities. "Consequently, the three lines are being constructed to satisfy the needs of Project No. 2685 and should be included in the license for the project as parts of the project works." 41 FPC 714 (1969). Thus, the Commission recognized from the outset of this proceeding the association of three primary transmission lines with the Blenheim-Gilboa Project and the need for these three lines.

By order issued April 10, 1970, 43 FPC 521, the Commission approved exhibits showing the final location and design of two of the three 345 kv transmission lines of the project (i.e., the Gilboa-New Scotland and Gilboa-Fraser lines). They were approved in view of PASNY's immediate need for these lines to carry project power when the project's first two generating units were to be tested, in view of the lack of opposition to them, and in view of the consultation with Federal and state agencies which PASNY undertook, the recognition of the FPC's guidelines 1/ for the protection of aesthetic and other environmental values, and the examination of alternate routes. However, the Commission declined to approve the Gilboa-Leeds line and reserved decision thereon with respect to matters set forth in Article 34 of the license, i.e. design and route.

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1/ These guidelines were officially promulgated on November 27, 1970, in Order No. 414, 44 FPC 1491, but had been noticed in mid 1969, 34 F.R. 12718, prior to the issuance of the Commission's order approving the Gilboa-New Scotland and Gilboa-Frazier lines. Cf. 41 FPC 725-40, where Commissioner Bagge concurred with the issuance of a license for Project No. 2685 and attached guidelines set forth in the Report of the Working Committee on Utilities of the President's Council on Recreation and Natural Beauty. These were similar to the Commission's own guidelines adopted in Order No. 414.



By orders of the Commission between 1970 and 1973, some eight parties were granted intervention in this proceeding, including Petitioners Greene County Planning Board and Town of Durham.

On December 4, 1970, PASNY filed with the Commission two alternative proposals (Routes A and B) for routing the Gilboa-Leeds transmission line. On March 26, 1971, PASNY filed with the Commission, and circulated to intervenors and commenting agencies, its environmental report, showing, inter alia, three possible variations (Routes C, D, and E) of the two alternative routes. This procedure was pursuant to then existing Commission regulations implementing the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §4321, et seq.

Hearings were begun on PASNY's proposed routes for the Gilboa-Leeds line on November 9, 1971, and continued through January 7, 1972. They were interrupted by an appeal to this Court, Greene County Planning Board v. F.P.C. (Greene County I), 455 F.2d 412, (2nd Cir. 1972) cert. denied, 409 U.S. 849 (1972), which held, inter alia, that the Commission's initial NEPA regulations did not comply with the requirements of NEPA. 2/ The Commission then revised its pertinent rules and regulations in the manner which had been suggested by the Court. 3/

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2/ The holding of Greene County I, however, only applied to the Gilboa-Leeds line and not the other two transmission lines previously approved nor to the order issuing license, 455 F.2d at 424-25.

3/ (Footnote provided on following page)

On November 6, 1972, the Commission reopened this proceeding and required further procedures to implement NEPA pursuant to Greene County I, 48 FPC 978. The Commission found that a further hearing should be held, but not until (1) an environmental statement had been prepared by the staff; (2) comments had been received on the staff draft environmental statement; and (3) the draft environmental statement had been made available to the parties for a sufficient period of time for preparation of cross-examination. The Commission ordered that the staff's environmental statement be offered into evidence at the further hearing and cross-examination thereon be permitted.

The staff's draft environmental impact statement (DEIS) was filed on January 15, 1973 and circulated to some 32 Federal, State, and local agencies, organizations and individuals for their comments. Half of these responded and their letters are included in full in Appendix T (R. 4825-4914) of the final environmental impact statement (FEIS). Furthermore, these letters were summarized and the comments specifically answered by staff in the body of the FEIS (R. 4716-48).

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3/ (Footnote provided from previous page).

Order No. 415-C, Implementation of the National Environmental Policy Act of 1969, 48 FPC 1442 (1972), reh. denied, 49 FPC 359 (1973), amended, 49 FPC 1280 (1973).



A third commenting letter from the Environmental Protection Agency (EPA) was not included in the FEIS along with EPA's first two letters, because the FEIS was published in May, 1973 and the letter was not written until June 1, 1973. However, in a fourth letter to the FPC dated June 22, 1973 (R. 5474-75), EPA stated that its major concern regarding the construction of the Gilboa-Leeds line had been answered to its satisfaction in the FEIS.<sup>4/</sup> Therefore, in the end, EPA had no objection to the staff FEIS in the instant proceeding. A commenting letter from the State of New York Department of Environmental Conservation (DEC), dated March 13, 1973, was also not included in the FEIS. However, the DEC letter (attached to Greene County's brief) was not to the FPC, but rather to the Director, Office of Environmental Planning, New York Public Service Commission (PSC), who was coordinating all responses on the FEIS from New York State agencies. (The commenting letter from PSC for all New York State agencies is reproduced in the FEIS (R. 4863-66)).

The FEIS was based upon staff studies, comments received on the DEIS, the record compiled in this proceeding at the hearings held before Greene County I was decided (see

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<sup>4/</sup> In that letter, EPA added that its other concern, regarding the cumulative impact of Projects Nos. 2685 and 2729 (Breakabeen) on the water resources of the area, "can properly be assessed in the upcoming draft impact statement for the Breakabeen project."

supra, pp. 5-8), and upon supplemental information supplied by PASNY and Intervenor (R. 4572). The FEIS not only considered the initially proposed routes and alternative routes thereto for other overhead transmission lines, but it also considered laying the transmission lines underground, alternate sources of power, postponement of construction, denial of construction of any route, the relationship of this line to the proposed Breakabeen Pumped Storage Project, FPC Project No. 2729, just north of Project No. 2685, and the long-range plans for power transmission in New York State and the Northeast Region (R. 4572-74).

The FEIS was filed and made available to the public on May 21, 1973. On July 2, 1973, hearings resumed in Washington, D.C. with cross-examination of staff and PASNY witnesses. Hearings continued intermittently in Albany, New York 5/ and Washington, D.C. until September 19, 1973, when the record was closed.

Shortly before the FEIS was circulated the Greene County Planning Board moved that the DEIS be rewritten and circulated on the ground that it was deficient. Review was

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5/ The initial session in this proceeding was held at Albany, New York, on November 9, 1971, for the purpose of giving local citizens the opportunity to be heard. Hearings were continued in Albany on November 10 and 12, 1971, so that intervenors could cross-examine PASNY witnesses without the burden of travelling to Washington, D.C. Additional hearings were held in Albany on September 4, 5 and 6, 1973, for the convenience of intervenor's rebuttal witnesses who lived and worked in that area and for whom attendance in Washington, D.C. would constitute a hardship.



ultimately sought in the U.S. Court of Appeals for the Second Circuit on the ground that the Commission had denied relief sub silentio. On December 27, 1973, this Court issued an opinion and an order dismissing the petition because of the lack of a final appealable order and denying a motion to stay the proceedings before the FPC. Greene County Planning Board v. F.P.C., 490 F.2d 256 (2nd Cir. 1973) (Greene County II). In the course of its opinion, the Court stated (490 F.2d at 258):

The Federal Power Commission has both fulfilled its statutory obligation and sufficiently complied with this Court's order by providing for an Environmental Impact Statement. The draft EIS was subjected to criticism as is evidenced in the motion papers. The parties are free to comment on any claimed inadequacy in the FEIS. \* \* \*

There will scarcely be an EIS filed which will not appear to some party to be deficient according to his point of view.

After Greene County II, briefs were filed by the parties to the proceeding. PSC, although not a party, filed a brief on limited issues. An Initial Decision was issued by the Presiding Administrative Law Judge on July 1, 1974. He stated:

\* \* \* I have concluded that a direct line to Leeds is needed now to carry stable and reliable project power to the distribution systems of PASNY's customer companies, the interconnected transmission system, and load centers throughout the state, particularly in the greater New York City metropolitan area. A single 345kv Leeds line is presently needed to complete project requirements.

However, Section 10(a) of the Federal Power Act [16 U.S.C. §803(a)] and NEPA impose a broader standard and definition of the public interest than what is needed to complete the project covered by the pending application. \* \* \* (R. 7051).

The application of these broader statutory standards requires that the Leeds line be designed so as to be able to carry far larger quantities of power than that generated or required solely by the B-G project. Comprehensive planning requires consideration of the possibility that an additional pumped storage project may be built on Schoharie Creek at Breakabeen about six miles downstream from the B-G project, for which an application was filed on March 30, 1973; or that additional fossil or nuclear fueled base load generating facilities may be built in the vicinity of Leeds or in the adjacent Hudson Valley area. These possibilities are thoroughly explored in the record including Staff's FEIS (Exhibit 71, pp. 115-34). They indicate strongly that the Leeds line should be capable of carrying two 345kv circuits convertible to one 765kv circuit. \* \* \* During the course of this entire proceeding, the record has been updated from time to time to show the current state of PASNY and New York State agency studies and planning on related area generating facilities and transmission line network (see Appendix C to Ex. 71, showing the state 765kv grid as planned by 1991). These studies indicate that a 765kv line will be needed from Gilboa to Leeds, whether or not a Breakabeen project is licensed. (R. 7052)

The Initial Decision discussed in detail the following points: need for the line, proposed routes, design of the towers, width of the right-of-way, undergrounding of the line, compliance with NEPA and Greene County I and conduct of the hearing.

Specifically as to the need, the Presiding Administrative Law Judge found:

The Leeds line is a primary project line needed now to bring project power to the distribution system of Central Hudson Gas and Electric Corporation (Central Hudson) and to the interconnected north-south primary transmission system servicing the New York City metropolitan area. It is therefore potentially the most important of the three project primary lines because it is the shortest route from the project to the New York City area. However, the need for project power is statewide and the three primary lines are necessary to meet the need. \* \* \* The output of the project is used throughout the state as critical



demands require, regardless of locations of the territories of the utilities to which the power is sold to each. Control of the flow of the power is exercised by the New York Power Pool. \* \* \* Most critical loads occur in the upstate area in the winter and in the New York City area in the summer. (R. 7053-54)  
(Emphasis supplied).

Furthermore, the Judge found that the need for the Gilboa-Leeds line was underscored by the reliability and stability which it adds to the interconnected system. For example, if New York City needed Blenheim-Gilboa's 1,000mw of power, and if existing lines were in full use for other parts of the system, "there would be no efficient and reliable means of moving project power south to the metropolitan area absent a Gilboa-Leeds line. Without the Leeds line in service, maximum project output will not be available when and where needed." The Judge also points out, with respect to stability, that if the Gilboa-New Scotland line is lost, at least half of the plant generation at the B-G project will be lost, and, if this condition persists for more than two seconds, the stability of the plant and the transmission system may be adversely affected (R. 7056).

Thus, Judge Levy concluded that a Gilboa-Leeds line was needed and should be authorized unless its adverse environmental impact outweighs its other benefits (R. 7059).

In choosing a route for the transmission line, Judge Levy agreed with the intervenors that Route B-1 "is the superior proposal with the least adverse environmental impact." (R. 7061, A. 16). He noted that "the environmental and visual

aspect is the decisive factor because the differences in cost, engineering, and other quantifiable costs and benefits between the two routes [A and B], are relatively minor." (R. 7061).

In determining that the proceeding under review complied with Greene County I and NEPA, the Judge compared what was done by the staff with the applicable case law. He discussed all the objections raised by intervenors. In sum, he found that Staff's FEIS "brings environmental factors to an equal footing with economic, technical, and other traditional considerations \* \* \*" and constitutes "an objective good faith compliance with the demands of NEPA" [citing National Helium Corp. v. Morton, 486 F.2d 995 (10th Cir. 1973)]. 6/ He further stated that "[t]he role of the FEIS 'is to enunciate the environmental considerations for the benefit of the decision makers.' That standard has been met in this proceeding." (Footnote omitted) (R. 7069).

Finally, Judge Levy discussed the intervenors' contentions that they had been deprived of a fair, impartial and full hearing. The Judge reaffirmed his rulings and rejected again their contentions, indicating that nowhere has it been shown that the cited rulings prejudiced intervenors' case.

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6/ He specifically recognized that "the cases hold that the comments are to be regarded as an integral part of the statement." National Helium, 486 F.2d at 1003 (R. 7068).



On January 29, 1976, the Commission issued Opinion No. 751, (55 FPC \_\_\_, R. 7297-7332), affirming and adopting, as supplemented, the Initial Decision authorizing construction of the Gilboa-Leeds transmission line. At the outset of its opinion the Commission demonstrated an understanding of the environmental implications of this case when it stated (R. 7302):

We may note first that the construction and operation of a transmission line will have a certain impact on the environment during the relatively short period of its construction and a different impact thereon following construction and during the relatively long term operating life of the line. While the impact during construction, no matter how significant from an environmental point of view, will be minimal over time, the impact following construction and during the operating life of the line will be significant over time whether or not it is significant from an environmental point of view. With these distinctions in mind, and recognizing that NEPA is concerned with both the short and long term adverse effects of our actions, we call particular attention to Judge Levy's finding that "The major adverse environmental impact is visual and aesthetic." No participant had filed an exception to that finding. Indeed, as noted by Judge Levy, Durham witness Dr. David Lowenthal, testified (Tr. 3067) that "the locating of transmission lines is not one of the major ecological disturbers." (Footnote omitted)

The Commission then proceeded to review the record, the Initial Decision and the exceptions thereto with respect to the need for the Gilboa-Leeds line.

However, the Commission expressly put into proper focus the context of its examination of this one primary line by noting (R. 7305):

Obviously our approval of the Gilboa-Leeds line must be considered in connection with the existing and proposed transmission lines, generating stations and other electric facilities of the interconnected systems to satisfy the criteria of the Federal Power Act and NEPA.

The Commission then determined that "[i]t is thus necessary to promptly connect the Gilboa-Blenheim plant to Leeds so that its instantly available hydro power can be made available to the several load centers, particularly New York City" (R. 7306). The Commission concluded that (R. 7306-07):

The proposed Gilboa-Leeds line is necessary as an integral part to the existing and proposed segments of the New York 345 kv grid. \* \* \* The evidence here shows that the connections between Leeds and New York City must be strengthened regardless of the Gilboa-Leeds line because power will flow from the north as well as from possible new generating stations in the Leeds area. Our purpose is to approve a primary line for the Gilboa-Blenheim Project so that under Section 10(a) of the Federal Power Act the project will be best adapted to a comprehensive plan for improving or developing a waterway for the benefit of interstate commerce. Even though we do not have jurisdiction under the Federal Power Act over the siting and construction of transmission lines, apart from primary lines, we properly considered the present and proposed 345 kv network. (Footnotes omitted)



Next the Commission discussed the proposed 765 kv plan for New York and its relation to the Blenheim-Gilboa line. It was recognized that "the 765 kv plan shown in the FEIS may not represent what actually will be built. However, the record indicates that it is likely that a 765 kv line will be needed between Gilboa and Leeds" (R. 7307). The Commission admitted that it was unknown when the Gilboa-Leeds line might have to be raised to 765 kv, but pointed out that Section 202 of the Federal Power Act, 16 U.S.C. §824a(a), authorizes the FPC "to encourage the interconnection and coordination of facilities" without, however, bestowing any additional power to authorize "the building of power lines except those that are primary lines in connection with a hydroelectric project" (R. 7307).

In sum the Commission found (R. 7308):

While the record is full on the environmental aspects of the Gilboa-Leeds line and deals with future plans as to the development of 345 kv and 765 kv lines with which the Gilboa-Leeds line will interconnect, these plans are not yet firm. We know from the record that one 345 kv circuit is now required to connect Blenheim to the transmission network, and that the plans are sufficiently definite that provisions should be made for a second 345 kv circuit and conversion to a single 765 kv circuit. We thus have not blinded ourselves to potential developments,

but have considered the Gilboa-Leeds line in the light of future plans and possibilities. See Greene County Planning Board, supra, 455 F.2d at p. 424. This does not require us to delay a determination on the Gilboa-Leeds line until we can evaluate the whole future northeastern transmission network. Hence we conclude that we should authorize the Gilboa-Leeds line with place for a second 345 kv circuit, so that it can be converted to a single 765 kv circuit because of the strong possibility that this will be necessary in the future.

Finally, with respect to other potential generating facilities in the vicinity of the Gilboa-Leeds line, the Commission stated (R. 7309):

Breakabeen is not a reason for licensing the Gilboa-Leeds line, but could be a reason for building a line which will accommodate a second 345 kv circuit. It is upgradeable to 765 kv, not to serve Breakabeen but the grid. Further, we do not know whether there will be base load plants in the vicinity of Leeds. The Gilboa-Leeds line may be used to carry pumping power from them to Gilboa, but we do not rely on the building of such plants to support licensing the Gilboa-Leeds line. To delay a determination on the Gilboa-Leeds line for several years until a license is issued for Breakabeen would be contrary to the public interest.

Following petition for rehearing, on April 27, 1976, the Commission issued Opinion 751-A, (55 FPC \_\_\_, R. 7347-55) denying rehearing and denying motions for reopening the record and for a stay. In Opinion No. 751-A the



Commission reiterated its conclusions regarding the present need for the line, stating that "our approval of the Gilboa-Leeds line does not depend on the details of Power Pool development, but on the needs, as set forth in Opinion No. 751 and in this opinion and order, including the operation of the Blenheim-Gilboa plant as a reliable source of power. \* \* \* the fact that [recent data indicates that] the population of New York City may be [declining] \* \* \* does not change the situation significantly. We are approving the Gilboa-Leeds line to meet present needs" (R. 7353).

On June 7, 1976, the Commission denied rehearing with respect to reopening the record and the stay request. After the Commission's orders of April 27 and June 7, 1976, Greene County and Durham filed petitions for review with this Court pursuant to Section 313(b) of the Federal Power Act, 16 U.S.C. §8251(b).

ARGUMENT

I. The Presiding Administrative Law Judge Compiled A Full Record While Affording Greene County A Fair And Complete Hearing.

Greene County alleges (Gr. Co. p. 62) that the Presiding Judge committed so many procedural errors during the course of the administrative proceeding as to preclude the compilation of an adequate record. Recognizing, however, that any appellate challenge as to the fairness of the hearing process is necessarily a difficult task (Andrews v. Knowlton, 509 F.2d 898, 907 (2nd Cir. 1975)), Greene County chooses not to make the effort.

Rather, it merely draws the ultimate conclusion that, in its view, the alleged errors of the Presiding Judge established a lack of procedural due process and a failure to compile a full record. Such a finding, of course, requires a far more detailed and persuasive analysis than Greene County provides, either in its argument or recitation of the facts. The Commission, after reviewing the record as a whole, concluded in Opinion No. 751, p. 16 (R. 7314):

We are not attempting to say that every ruling was correct or every statement made by Judge Levy is appropriate, but we are of the opinion that he conducted a hotly contested proceeding with fairness and efficiency. In any case there is nothing to show that his ruling aggrieved Greene County or other intervenors.



While Greene County does not make any attempt to support its claim of a denial of due process or an incomplete record in the Argument portion of its brief, it does in the Statement of Facts (Gr. Co. pp. 4-33) cite several examples of claimed error. Analysis of these should completely lay to rest the argument that Greene County was denied a full and fair hearing.

Thus, Greene County alleges a total failure of discovery in the proceeding below (Gr. Co. p. 11). In fact, the Presiding Judge quite properly urged the parties in the first instance to seek informally the voluntary exchange of information. A great deal of data was made available to Greene County in this manner. In regard to those instances in which Judge Levy refused to order the production of materials, it must be recognized that a presiding judge has a responsibility not only to the conduct of the proceeding as a whole, but to the other parties to screen formal requests for discovery and to disallow all those which are unnecessary or improper. Greene County's general allegation that the Presiding Judge refused to order formal discovery misses the point. The real issue is whether he failed to require the production of relevant data and, if so, to what extent Greene County was thereby

harm. Greene County wholly fails to specify any relevant data that it was denied or to demonstrate specific harm caused by denial of production of particular data.

The "most egregious" example, in Greene County's view, of Judge Levy's alleged procedural error in failing to direct production (Gr. Co. pp. 23-24) is in fact a product of its own misunderstanding. During cross-examination (R. 1784-86), staff witness Jessel referred to a study by staff dealing with whether Gilboa-Leeds is a primary line, as defined by Section 3(11) of the Act, 16 U.S.C. §796(11), and thus under Commission licensing jurisdiction. Counsel for Greene County requested production of the report mistakenly assuming that any such report must involve the question of the line's need, although he continually referred to it as the "primary line" study (see, e.g. R. 6924). In fact, the issue of whether a line is needed for the reliable operation of a hydroelectric project is far different than the question of whether, once built, it will be a "primary line." The latter issue is relatively simple, in a technical sense, involving the line's use, i.e., to what extent is the line used solely for project purposes.



The Presiding Judge and staff counsel understood this distinction. They also recognized that the mixed question of law and fact 7/ as to whether Gilboa-Leeds is a primary line had been decided earlier by the Commission. The transcript discussion at R. 3881-89 demonstrates that while staff counsel and the Presiding Judge properly understood that staff's primary line study had no present importance, counsel for Greene County was wrongly convinced that it represented staff's analysis as to the need for Gilboa-Leeds (see, especially, R. 3883).

Greene County perpetuates its misunderstanding in its brief where it declares, referring to the primary line report (Gr. Co. p. 24):

\* \* \*, the FPC Staff's engineering reports as to the alleged need for the Gilboa-Leeds line to serve the Blenheim Gilboa Project are not even in the record of this case.

Indisputably there is ample expert testimony as to the need for the line in the record. Greene County, however, remains confused as to the subject of staff's primary line report. The fact that a study concluding that the Gilboa-Leeds line is a primary line was not put into the record is not error, for it is uncontroverted that the line is a primary line of the Elenheim-Gilboa Project.

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7/ There are many reported decisions which give meaning to the term "primary line."

Finally, Greene County alleges error on the part of the Presiding Judge because he limited the testimony of a witness employed by New York State (Gr. Co. pp. 25-26). Its argument, however, distorts the actual conditions of Mr. Burgraff's appearance and misses the difficulty of determining the proper scope of his testimony.

The background of his testimony is set out in the transcript discussion at R. 2142-60. Mr. Burgraff was an employee of the State of New York. New York did not oppose his testimony on factual matters, but argued that their employee should not be subpoenaed as an expert. New York argued that he had not made--and could not be compelled to prepare--such testimony (R. 2156). The Judge ruled that New York would not be compelled "to furnish [Greene County] with a prospective expert witness if the state of New York is unwilling to do so" (R. 2160-61). 8/ The judge added that he did not

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8/ New York had cited Virginia Petroleum Jobbers Ass'n. v. F.P.C., 293 F.2d 527 (D.C. Cir. 1971), cert. denied, 368 U.S. 941 (1961), reh. denied 368 U.S. 979 (1962) (R. 2155), which upheld the refusal of the hearing examiner and the Commission to subpoena expert testimony prepared by a private engineer for a party's predecessor in the absence of an agreement to pay appropriate compensation. Greene County at one point (Gr. Co. p. 25) implies that it was staff's view that opinion testimony would be appropriate. Greene County, however,

(Footnote continued on following page)



think it was appropriate to "compel employees of the state of New York, which has already gone through its administrative process in arriving at its opinions and conclusions with regard to this project and the alternatives, \* \* \* [to appear] to be used to collaterally attack such opinions and conclusions" (R. 2162).

The actual testimony of Mr. Burgraff appears in the transcript at R. 3527-82. A reading of those pages, especially R. 3563-75, demonstrates the unavoidable problems that arose respecting the proper scope of his testimony. Throughout Mr. Burgraff's testimony, the Presiding Judge allowed the receipt of much valuable factual evidence, but carefully prevented opinion testimony. Under the unique circumstances of Mr. Burgraff's appearance, such action by the Presiding Judge was proper.

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8/ (Footnote continued from previous page).

cuts off the relevant transcript passage. Staff counsel was in fact referring to factual testimony based in part on field observations. He declared (R. 3547):

The State of New York has offered this witness as an expert and they wish him to give his opinions and cognate to his field observations. Anything of his memory which corresponds to field -- \* \* \*.

If follows that Greene County's allegations as to a failure of procedural due process are without basis. The Presiding Judge conducted a fair hearing which produced a full record. Greene County's arguments to the contrary, as demonstrated above, cannot withstand objective analysis.



II. Substantial Record Evidence Establishes The Need For The Gilboa-Leeds Line.

Greene County argues the record compiled in this case does not support the need for the Gilboa-Leeds line. However, this argument is based on a misapprehension of the primary role to be played by the line. Thus, Greene County states (Gr. Co. p. 34):

It is perfectly clear, and apparently conceded by all, that the only possible justification for the [Gilboa-Leeds] line is an integral and inseparable part of a larger comprehensive plan of interrelated electric power facilities in which this line's primary function would be for the overall system.

In so stating, Greene County loses sight of a central fact in this case: the Gilboa-Leeds line comes under the Commission's jurisdiction only because it is a "primary line" of the Blenheim-Gilboa hydroelectric project, pursuant to Section 3(11) of the Act, 16 U.S.C. §796(11). It is a "primary line" because its primary function is to serve the needs of the Blenheim-Gilboa hydroelectric project by connecting it to a "point of junction with the distribution system or with the interconnected primary transmission system" (16 U.S.C. §796(11)).

If this were not its primary function, the line would in all likelihood come under the jurisdiction of the Public Service Commission of the State of New York (PSC). While the Federal Power Commission has in this proceeding quite properly considered potential, related power development, such consideration cannot change the basic role of the line. Indeed, if and when the line's basic function changes, it may no longer come under Commission jurisdiction.

For the present, however, it is settled (see 41 FPC at 715) that the Gilboa-Leeds line is part of a jurisdictional hydroelectric project. Moreover, there is substantial record evidence that it is needed now for the reliable operation of that project.

In his Initial Decision the Presiding Judge said (R. 7051):

PASNY asserts that a direct line to Leeds has always been needed for the reliability and stability of the project and is a necessary component of the project in the expert opinion of every engineer who participated in planning the project or who testified in this proceeding. (Footnote omitted).

On the basis of the substantial record evidence referred to by PASNY (see, for example, the testimony of Dr. Jessel at R. 1188-95), both the Presiding Judge and the Commission properly agreed with PASNY that the line is needed now for the reliability and stability of the Blenheim-Gilboa



hydroelectric project. Greene County has not demonstrated that the Commission's expert judgment in this regard is incorrect.

Among other things, the record shows that for the project to serve all of PASNY's load area effectively, a separate line (or circuit) is needed to the east or southeast. 9/ The Presiding Judge found that (R. 7052): "\* \* \*, the need for project power is statewide and the three lines are necessary to meet this need."

Greene County's observation (Gr. Co. p. 34) that the project's power can be carried by either one of the two existing primary lines ignores this need for effective delivery of the power. It also ignores uncontroverted expert testimony which establishes in this case the need to connect a generation source such as Blenheim-Gilboa to the interconnected transmission system by at least three separate circuits so as to achieve maximum stability and reliability of operation. This is demonstrated by the following passage in the initial decision (R. 7054-55):

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9/ Two primary lines of the Blenheim-Gilboa project are already in operation, one running northeast to New Scotland, the other running southwest to Fraser.

Loss of the New Scotland line will result in a loss of at least half the plant generation and, if the condition continues for more than two seconds, the stability of the plant and the transmission system may be adversely affected (Tr. [R.] 2017). Adding a second set of circuit breakers, relays and signals in lieu of the Leeds line would cure only one stability problem -- a stuck breaker, and that only if all connected lines are in service and operating properly -- an assumption that is not supported by actual experience. There are other events [omitted footnote refers in part to R. 3147-50] which cause instability in the system as well as the plant itself. The availability of the Leeds line will eliminate the need to reduce generation for the opening of the other lines and reduce the severity of oscillations and stresses on plant facilities thus maximizing plant output and reliability.

The Commission's decision as to the need for the Gilboa-Leeds line, therefore, is proper and is based on substantial record evidence.



III. The Commission Properly Determined That The Record Should Not Be Reopened.

Greene County charges (Gr. Co. pp. 47-51) that the Commission improperly refused to reopen the record to consider new data which became available after the record was closed. In making this argument, Greene County attempts to rely heavily on this Court's decision in Hudson River Fishermen's Association, et al. v. F.P.C., 498 F.2d 827 (1974). However, such reliance is misplaced, for in that case later study established the probability that an underlying assumption of the Commission's decision had been wrong at the time that record was made. Here, by contrast, a disappointed party is trying to overturn a decision, based on a record which was fully accurate when it was made, by pointing to subsequent studies and estimates which it claims might lead to a different conclusion.

In this latter situation the courts have not required agencies to reopen records, lest valid decisions be continually undercut and the administrative process rendered never ending. I.C.C. v. Jersey City, 322 U.S. 503, 514-15 (1944). On this ground alone, the Commission's decision not to reopen the record here was proper.

However, the Commission did not rely on purely technical considerations in refusing to reopen the record. It declared in Opinion No. 751-A, p. 5 (R. 7352):

In a proper case, of course, it may be necessary and appropriate to reopen the record, but that has not been shown here.

Greene County points to recent estimates as to future load demands on PASNY's system and argues that Gilboa-Leeds may not be needed for the reliable operation of the project. It states (Gr. Co. p. 48):

Data as to loads (i.e. consumption) is the key element in making conclusions as to reliability (Tr. [R.] 941-42).

A great many factors, however, must be considered in any decision as to reliability. The testimony of PASNY witness Loehr at R. 941-42, in fact, demonstrates that the size of a system's load is only one of many considerations to be weighed in determining reliability. Indeed, Greene County recognized this fact when it stated (Gr. Co. p. 28):

\* \* \*, the stability point is one that turns on projections of electric power loads, the existence or nonexistence of power plants and transmission lines planned in other places in New York State and a variety of additional factors (See Tr. [R.] 1698-1701).

Because Greene County can point only to revised estimates (which, in turn, are subject to change) as to the size of future loads, it was not error for the Commission to conclude (R. 7352):

\* \* \* changes in electric power use and growth in New York State, pointed out by Greene County,



have no necessary importance. The Gilboa-Leeds line will have to be built to render the delivery of 1000 Mw of power from the Blenheim-Gilboa plant reliable. A smaller future growth in New York State would not make the output of the Gilboa-Blenheim plant any more reliable. The transmission system should be designed to permit delivery of the power in any case.

The Commission recognizes that the Blenheim-Gilboa project is operating and, with the addition of the necessary third primary line to the southeast, could operate at peak efficiency to serve all existing load demands on the PASNY system. 10/ It recognizes as well that a present fluctuation in the estimates as to future load size can have little if any effect on the technically complex issue of whether Gilboa-Leeds is needed for the proper operation of the existing project. (See discussion, supra, Pt. II.).

Greene County argues, in addition, that the Commission must examine the actual operation of the project with only two primary lines (Gr. Co. pp. 50-51). It suggests that such operation may mean Gilboa-Leeds is not in fact needed.

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10/ Greene County's reference to a reopening by the Nuclear Regulatory Commission (Gr. Co. p. 50) is inapposite. The issue there was whether a new generation source was needed. Here, by contrast, the generation source is operating; the issue is whether a third primary line is needed so that the generation source might operate reliably.

However, the Commission responded to this contention when it stated that the record (R. 7352):

\* \* \* shows that three lines, not two, are needed for reliability because of possible outages and because of the loads of interconnecting utilities that affect use of the Gilboa-New Scotland and Gilboa-Fraser line.

The fact that the project has been able to operate at less than optimal conditions does not undercut the expert testimony in the record that the stable, reliable and efficient operation of the project requires a third primary line.

Two observations are pertinent in this regard: (1) the fact that an outage of one of the two existing lines has not yet occurred does not obviate the possibility that such an outage may occur in the future and, thus, the need for a third line as a back-up; (2) Greene County's insistence (Gr. Co. p. 51) that only upstate utilities are the customers of power from Blenheim-Gilboa ignores the fact that PASNY also serves New York City. A study of the actual operation of Blenheim-Gilboa with two primary lines, therefore, could not significantly affect the conclusions drawn from the existing record.

It follows that nothing pointed to by Greene County warrants a decision to reopen. As discussed, Greene County has not in any event established that the record in this case was in error at the time it was made.



IV. The Scope Of The Commission's Consideration In This Licensing Proceeding Was Proper.

Greene County alleges generally (Gr. Co. pp. 34-47) that the scope of the Commission's consideration was too narrow and that the Commission should have examined in greater detail a much broader plan of development than that presented to it by PASNY's application for the Gilboa-Leeds line. This is a separate question from the issue of the sufficiency of the Commission's FEIS (in terms of its scope and discussion of alternatives) which is dealt with in Pt. V, infra. Here we consider the Commission's compliance with the letter and spirit of the Federal Power Act.

As noted (Pt. II, supra), the physical structure at issue here is a 36 mile long transmission line which is needed now for the reliable operation of a constructed hydroelectric project. But for its primary function of serving the needs of that project, it would not be subject to the Commission's jurisdiction (see again, Section 3(11) of the Act, 16 U.S.C. § 796(11)). Greene County's persistent assertion that the line's "main purpose is to serve a larger electrical system" (Gr. Co. p. 44, second footnote) ignores the fact that if that were so, the case would not have been before the Commission.

It has been consistently recognized that the Commission's licensing authority with respect to

transmission lines is limited to primary lines of jurisdictional hydroelectric projects.<sup>11/</sup> Such authority does not extend to those lines which make up the interconnected distribution system in New York State. As Judge Oakes observed in Greene County III, supra, 528 F.2d at 45:

However much we might agree with the petitioners that there may be great need for a single regulatory body having planning responsibility over various aspects of electric generation and transmission, the FPC does not have such responsibility in this situation, see FPC v. Louisiana Power and Light Co., 406 U.S. 621, 635-36, 92 S. Ct. 1827, 32 L. Ed.2d 369 (1972), for it is clear that these facilities are not subject to Commission regulations under the provisions of Part One of the Act. The argument advanced by petitioners is one for Congress, not the courts.

While Judge Oakes was referring to the fact that no "comprehensive plan" responsibility, pursuant to Section 10(a) of the Act, 16 U.S.C. § 803(a), attaches with respect to the Commission's approval of an international interconnection (see fn. 11, supra), it is equally true that the Commission does not have comprehensive planning responsibility for the electrical distribution system of New York State or the entire Northeast. Rather, such a planning responsibility "arises only in connection with projects over which [the Commission] has licensing

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<sup>11/</sup> The one exception to this is the Commission's authority under Executive Order No. 10485, 3 C.F.R. 970 (1949-53 Comp.), to permit international interconnections of transmission lines. Such action by the Commission was at issue in Greene County Planning Board v. F.P.C., 528 F.2d 38 (2nd Cir. 1975) (Greene County III), where this Court dismissed Greene County's petition for review for lack of jurisdiction pursuant to Section 313(b) of the Act, 16 U.S.C. §2251(b).



jurisdiction" (528 F.2d at 45).

The issue here, therefore, is whether the Commission has satisfied the requirements of Section 10(a) of the Act, 16 U.S.C. § 803(a), as judicially interpreted, in its licensing of the Gilboa-Leeds line. The relevant statutory language is as follows (16 U.S.C. § 803(a)):

Sec. 10 \* \* \* All licenses issued under this Part shall be on the following conditions:

(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water power development, and for other beneficial public uses, including recreational purposes; \* \* \*.

This Court in Greene County I, supra, referring to relevant discussions in Scenic Hudson Preservation Conference v. F.P.C., 354 F.2d 608 (2nd Cir. 1965), cert. denied sub nom Consolidated Edison Co. of New York v. Scenic Hudson Preservation Conference, 384 U.S. 941 (1966), and Udall v. F.P.C., 387 U.S. 428, declared (455 F.2d at 423-24):

Although these decisions may not have established long-range planning requirements, [omitted footnote discusses the fact of "fragmented government regulation of power development"] they evidence a clear intent that the Commission at least should consider all available and relevant information in performing its functions.

We submit that the Commission has fully met this standard in the present case. Its decision demonstrates

a complete awareness of potential, related development, while not losing sight of the present need to license a third primary line for the Blenheim-Gilboa project. (See Opinion No. 751, pp. 7-11, R. 7305-09). Specifically, the Commission has required that the presently needed transmission line be constructed in such a manner as to allow its carrying capacity to be increased in the future with relatively little effort.

It is incorrect for Greene County to state (Gr. Co. v. 60) that the Commission requirement amounts to an authorization of such upgrading. Rather, the Commission has merely recognized the possibility of such upgrading and has made provision for it so that if and when it is authorized Greene County might be saved the burden of, for example, a second transmission line right-of-way or the construction of different towers. This is precisely the type of comprehensive planning required by Section 10(a) of the Act, 16 U.S.C. § 803(a), in regard to the licensing of a jurisdictional transmission line.

Moreover, the Commission went to great lengths to determine the best possible design and location of the Gilboa-Leeds line. It also imposed strict requirements as to PASNY's construction, operation, and maintenance of the line. (See, for example, Opinion No. 751, p. 24, R. 7322). Finally, it made provision for



the potential use of right-of-way lands for recreational purposes. (See license Article 43, Opinion No. 751, p. 25, R. 7323).

The Commission's consideration of this case, therefore, was not overly narrow. By the same token, planning responsibilities imposed by Section 10(a) were fully met.

V. The Commission's Environmental Impact Statement Is Adequate.

The majority opinion in Greene County II, supra, sets the stage for the present consideration of Greene County's claim (Gr. Co. pp. 34-47; 52-61) that the Commission's FEIS is deficient. Judge Moore declared (490 F.2d at 258):

The Federal Power Commission has both fulfilled its statutory obligation and sufficiently complied with this Courts' order [in Greene County I, supra] by providing for an Environmental Impact Statement. The draft EIS was subjected to criticism as is evidenced in the motion papers. The parties are free to comment on any claimed inadequacy in the FEIS.

The sole issue, therefore, is whether the Commission has complied with the requirements of NEPA in finding the FEIS prepared by staff to be adequate.

At the outset it must be emphasized that the Environmental Protection Agency (EPA), by letter to the Commission dated June 22, 1973 (R. 5474-75), expressly stated that following its review of the FEIS (R. 5474):

\* \* \*, we no longer suggest as necessary, one comprehensive impact statement on the pumped storage facilities and associated transmission lines.

Our concerns regarding the construction of the Gilboa-Leeds transmission line have been answered to our satisfaction.

This letter and its expression of EPA approval of the FEIS need to be emphasized in light of representation made to this Court by Greene County. At least twice in its initial brief



(Gr. Co. pp. 1,39), Greene County suggests that EPA found both the DEIS and FEIS inadequate. Moreover while Greene County stresses the fact that EPA questioned the sufficiency of staff's DEIS, it neglects to mention that EPA found the FEIS adequate. Greene County II, supra, makes clear that the FEIS is the proper focus of attention with respect to NEPA compliance.

Similarly, Greene County refers (Gr. Co. pp. 1, 39, 52) to a commenting letter by the New York State Department of Environmental Conservation (DEC) dated March 13, 1973, and attaches it to its initial brief. That letter, which commented on the DEIS, was not addressed to the Commission. Rather, it was addressed to an official of the New York Public Service Commission, which served the commenting function for several New York agencies. It is extraordinary that Greene County should attack (Gr. Co. p. 52, footnote) staff's failure to include such a letter in the FEIS. While it was no doubt considered by PSC in preparing its joint commenting letter, in no sense was the DEC letter an official comment to the Commission.

A. The Scope Of The FEIS Was Proper.

Greene County's argument (Gr. Co. pp. 35-42) that the scope of the FEIS was too narrow is based on its misconception that the lines primary purpose is to serve the needs of a broad transmission system. Because its main function

is to serve the Blenheim-Gilboa project, it was fully proper for the FEIS to focus on the line as part of that project.

Moreover, the main environmental effect of the line licensed here by the Commission is visual (see the initial decision at R. 7059). Its impact is therefore local in nature and not cumulative, as is the case with respect to actions which result in air or water pollution.

With respect to the proper scope of the FEIS, a useful comparison is afforded by Indian Lookout Alliance v. Volpe, 484 F.2d 11 (8th Cir. 1973). In that case an action for injunction brought into question the scope and extent of an EIS relating to construction of highways to be funded in part by federal grants. Iowa adopted a plan for a Freeway-Highway System, involving 1,877.94 miles of road. Iowa sought federal funding of a northern seven-mile segment of a fourteen-mile road, part of a planned freeway. The Court noted (484 F.2d at 13):

The southern seven-mile segment cuts directly through the Indian Lookout area of thickly wooded hills and bluffs overlooking the Iowa River valley, an area of scenic, geological, historical and archaeological significance.

The District Court required that the EIS include the fourteen-mile project, but held it would be highly impractical for it to embrace the entire 1877 miles included in the plan, or the entire freeway of which the project was a part.



On appeal the Court held the fourteen-mile segment insufficient because, although the northern terminus was an interstate highway, the southern terminus was a county line. In this regard the Court stated (484 F.2d at 19):

A state \* \* \* should not be placed in a vise in which it can do nothing to take care of present traffic needs, to provide bypassing or congested areas, or to construct needed highways until an extensive time-consuming study has been made of the entire plan.

\* \* \*

On the other hand, we do not want to minimize the benefits and the need for long-range planning and also the advisability of at some point considering the long-range environmental effects of a state highway system. In order to accommodate and balance these two major considerations, we think that as a practical matter it is necessary to permit the division of a state highway plan into segments for the purpose of environmental considerations. \* \* \* However, in order to comply with the spirit and objectives of NEPA to safeguard natural resources while effectively applying the arts and the sciences in utilizing our natural resources and to cause a meaningful consideration of environmental effects along with a consideration of alternatives, the minimum length of state highway projects that are supported in part by federal funds must be extended to embrace projects of a nature and length that are supportable by logical termini at each end.

As indicated in Indian Lookout Alliance, supra, to be sufficient in scope for NEPA purposes, a highway route must join two cities, or connect logical terminal points

sufficient to make it independently supportable. The length should also be sufficient to permit a rational consideration of alternatives.

These criteria are fully applicable to the routing of project transmission lines, and are satisfied in this instance with respect to the siting of the Gilboa-Leeds line. Significant termini are built into the statutory definition of a project primary line. Under Section 3(11) of the Act, 16 U.S.C. §796(11), a primary line or lines must transmit power from the powerhouse "to the point of junction with the distribution system or with the interconnected primary transmission system." Independently of the connection needs of plants which may be constructed in the future, and the possible construction of further segments of the 765 kv grid, there is a present need for a third primary 345 kv transmission line to connect the operating Blenheim-Gilboa project to the existing 345 kv interconnected transmission system.

The scope of the FEIS in this case was not overly narrow. There was no improper segmentation of the "project" which is needed and proposed.

Greene County's reliance on this Court's decision in Chelsea Neighborhood Associations, et al. v. U.S. Postal Service, 516 F.2d 378 (1975), is inapposite. There the proposed project was a garage for postal vehicles combined with public housing facilities (see 516 F.2d at 381). The EIS improperly segmented the project, attempting to deal with the garage without adequately considering the other facet of the project.



The "project" at issue here is the necessary third 345 kv primary transmission line for the Blenheim-Gilboa plant, and it was fully considered in the FEIS.

In discussing Chelsea, Greene County suggests that the Commission in this instance has improperly segmented "a multi-stage proposal for Federal action" (Gr. Co. p. 40). This statement ignores the fact that if, for example, there is a future proposal to upgrade the Gilboa-Leeds line to 765 kv, the authorization of such a conversion would in all likelihood not be a Federal action. Moreover, the Commission's recognition, pursuant to its comprehensive planning responsibility under Section 10(a) of the Act, 16 U.S.C. §803(a), of the possibility of future conversion does not amount to an approval of such action. Similarly, the present construction of a 345 kv line in no sense precludes future environmental study of conversion to 765 kv and a decision against such authorization.

The distinction between this case and Chelsea is demonstrated by the following language (516 F.2d at 388):

If the potential impact of the housing is not considered before the VMF is constructed, it will be too late to reassess the project as a whole no matter what is shown by a later EIS for the housing prepared by another agency. (emphasis added)

Conversion to 765 kv, while a future possibility, is not at all part of the project proposed to and approved by the Commission.

Greene County's reliance on Natural Resources Defense Council, Inc., et al. v. Callaway, 524 F.2d 79 (2nd Cir. 1975), is also misplaced. As discussed, the primary environmental effect of the Gilboa-Leeds line is visual and, therefore, not cumulative. The dumping of highly polluted dredged spoil in Long Island Sound involved in that case, has a wholly different kind of effect.

While there is a possibility that the present project may encourage construction of additional transmission lines in other locations, the case is wholly unlike Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department, 400 U.S. 968 (1970) (petition for certiorari before judgment denied). In that case the project authorized made other environmentally damaging construction inevitable. By contrast the Gilboa-Leeds line does not contain segments standing "like gun barrels pointed into the heartland of \* \* \* [a] park." See Black, J., dissenting in San Antonio (400 U.S. at 971). Rather, it is a continuous, single line with obvious termini--the powerhouse and the necessary third connecting point with the statewide distribution system--



which is necessary now for the reliable operation of the Blenheim-Gilboa plant.

The recent decision of Kleppe v. Sierra Club, \_\_\_ U.S. \_\_\_ (1976), 44 U.S.L.W. 5104 (U.S. June 28, 1976), supports the Commission's decision in this instance, for it recognizes that regional environmental impact statements of the type urged here by Greene County are not always required. See especially footnotes 20 and 26 of the decision. Further, in footnote 21 and the text following, the Court states that "to prevail [petitioners] must show that [the agency has] acted arbitrarily in refusing to prepare one comprehensive statement . . . ." Greene County has not made this showing here.

The Commission, therefore, properly determined that the scope of the FEIS was adequate. As noted, EPA does not find fault with this determination.

B. The FEIS Adequately Considered Alternatives To The Gilboa-Leeds Line.

Greene County's allegation (Gr. Co. pp. 42-47) that the FEIS erred in its consideration of alternatives loses sight of the unique circumstances of this case. Because the need to be met by the Gilboa-Leeds line is the reliable operation of an existing hydroelectric plant, the alternatives to the line licensed here by the Commission are necessarily limited.

Greene County's discussion of Scenic Hudson I, supra (Gr. Co. p. 42), is misleading, for the issue there was the necessity to consider alternative generation sources with respect to a decision whether to license a particular massive new pumped-storage hydroelectric project. While the FEIS here did examine the possibility of additional generation as an alternative to the Gilboa-Leeds line (see R. 4677-78), the extraordinary comparative cost of such an alternative makes it unreasonable. Similarly, any such alternative would seem inconsistent with the record evidence that the reliable operation of the Blenheim-Gilboa plant requires three primary lines.

Greene County misunderstands the basis of the Commission's decision in this case when it asserts (Gr. Co. p. 44) that it is not the primary purpose of the Gilboa-Leeds line to serve the needs of the Blenheim-Gilboa project. This assertion has been answered at length, supra. The fact that the line may serve a secondary function of aiding the statewide transmission system does not change the fact that its main role is to serve as a primary line for a jurisdictional hydroelectric project. For this reason, possible system alternatives to the line approved by the Commission have little, if any, relevance. Uncontroverted expert testimony establishes the line's absolute need for the reliable operation of the Blenheim-Gilboa plant, not the statewide transmission system.



It follows that the discussion of alternatives in the FEIS was adequate. Not only were several alternative overhead routes studied (R. 4618-48; 46660-66), but the possibility of putting the line underground was considered (R. 4649-59). Moreover, the FEIS put before the Commission the alternatives of delayed construction and no construction.

The cases referred to by Greene County (Gr. Co. p. 46) do not establish that the FEIS is inadequate with respect to its treatment of alternatives. The reference to N.R.D.C. v. Morton, 458 F.2d 827 (D.C. Cir. 1972), is answered by the fact that the Gilboa-Leeds line is intended to meet the specific problem of Blenheim-Gilboa's present unreliable operating condition. With respect to Trinity Episcopal School Corp. v. Romney, 523 F.2d 88 (2nd Cir. 1975), it is sufficient to point out that the FEIS considered many alternatives other than different routes for the overhead line licensed by the Commission. Besides undergrounding, the FEIS examined the possibility of doubling-up on existing transmission line rights-of-way (R. 4661-66). Such alternatives would require "action of a significantly different nature which would provide similar benefits with different impacts" (523 F.2d at 94).

C. The FEIS Is A Product Of An Interdisciplinary Effort.

Greene County attacks (Gr. Co. p. 53) Commission compliance with Section 102(2)(A) of NEPA, 42 U.S.C. §4332(2)(A), which requires that agencies "utilize a systematic, interdisciplinary approach \* \* \* in planning and in decision-making which may have an impact on man's environment." Greene County's argument follows two lines: first, that the FEIS is essentially the product of a single engineer (Dr. Jessel) and second, that the staff's non-engineering witnesses who contributed to the FEIS were speaking outside the scope of their expertise with respect to certain designated statements in the FEIS. 11a/

To bolster its first point, Greene County states that the breakdown of staff responsibility shows that an engineer wrote slightly more than half of the document. This is misleading, however, because nearly half of the FEIS is devoted to a discussion of the proposal and alternatives thereto. By the very nature of the action herein, the proposed construction of a transmission line, the logical and most qualified person to "be responsible for" this part of the FEIS is an engineer. Greene County does not question Dr. Jessel's engineering qualifications, and rightly so, since they are outstanding (R. 1146-63).

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11a/ Greene County finds no objection in this regard to the testimony of Staff's geologist, Mr. Sargent.



As to other staff witnesses, Greene County claims they were outside the scope of their expertise in discussing certain designated subjects. Mr. Hauck, a fisheries biologist, was the head of the FPC's Section on Project Environment and Conservation and correlated preparation of the FEIS as Task Force Leader. He is criticized for discussing economics in the resort industry. Overlooked, however, is his eighteen years of experience in state park planning and management, and development of recreational resources, while working for the State of Idaho (R. 1285-87). Furthermore, after joining the FPC, Mr. Hauck was instrumental in developing the FPC's outdoor recreation program covering licensed projects all over the United States (R. 1288-89). Based on this experience, it was proper for him to discuss resort economics. Mr. Browder, a landscape architect, is criticized by Greene County for "opining on human psychology." The fact is, however, that Mr. Browder simply indicated on cross-examination that he had consulted a general textbook on psychology along with numerous other references. That human psychology may have an impact upon the landscaping and siting of transmission lines can hardly be denied. Finally, Greene County criticizes Mr. Roseberry, a wildlife biologist, for "theorizing on history and culture." Mr. Roseberry's

general area of responsibility in the FEIS was land uses. His education and degree were in the area of resource development "which includes a wide variety of biological and land use subjects." (R. 2641). He consulted with "state, Federal, and local historical societies" (R. 2639) as well as the National Register of Historic Places established pursuant to Public Law 89-665 (FEIS, R. 4597, 4803-04) in order to ensure that any place listed therein or designated as historic by State or local authorities would not be affected by the transmission line. Such responsibility was well within the competence of this witness.

Therefore, it is submitted that the FEIS was a product of an interdisciplinary approach by witnesses fully qualified in their areas of responsibility for the FEIS.



D. The FEIS Is Not Overly Generalized And Theoretical.

Greene County's argument (Gr. Co. p. 54-55) as to the FEIS being too generalized is based solely on its discussion of the statement's first 38 pages. While its selective treatment of those pages in no sense establishes the validity of its allegation as to them, Greene County does not even argue that the remaining pages of the FEIS are too generalized.

With respect to the first 38 pages of the FEIS, an objective reading shows that they do discuss for the benefit of the Commission the environmental impact of the proposed line in sufficient detail. For example, Greene County's discussion as to recreation (Gr. Co. 54) and its allegation in the accompanying footnote that the Commission failed to provide for the recreational use of the line's right-of-way must be considered in light of the license's Article 43 (R. 7105), which demonstrates that the Commission was not only made aware of but provided for recreational opportunities.

Greene County confuses matters by interchanging its own analysis of the FEIS with official comments made with respect to the DEIS (see Gr. Co. pp. 54-55). The issue here is whether the FEIS was adequate. While Greene County cites certain commenting letters on the DEIS, it refers to no commenting letter concerning the FEIS. As noted, EPA considered the FEIS to be adequate. In any event, Greene County's reference

to comments on the DEIS concerning the issue of mitigation ignores the fact that the Commission, in licensing the Gilboa-Leeds line, imposed specific requirements with respect to design and construction so that adverse effects might be mitigated to the greatest possible extent.



E. The Final Environmental Impact Statement Is Not Argumentative.

Petitioners contend that the FEIS, rather than constitute an objective appraisal of the project, is a brief in support of the project.

Rather than be specific, petitioners state broadly that comments on the DEIS received "summary and contemptuous" treatment in the FEIS (Gr. Co. p. 56). An examination of the relevant section of the FEIS (R. 4716-48) is sufficient to dispose of this claim. Not only does the FEIS discuss with specificity the points made in the comments, but incorporation of the comments and/or consideration of the substance of the comments are made in other sections of the FEIS.

Petitioners state the staff made selective use of prior agency comments in the FEIS, noting that from reading pp. 142-44 of the FEIS (R. 4712-14), "one does not know that the basic conclusion in 1971 of the letter referred to as representing the consolidated views of New York State agencies was that PASNY's planning process \* \* \* was inadequate." This contention might be true, primarily because the letter referred to (comment on the application by New York Public Service Commission) made no such conclusion. The letter detailed the PSC's comments on

PASNY's Environmental Report; each of the areas of concern noted by the PSC are listed in the FEIS (R. 4712-13).

In this section, entitled "A Summary Of Agency Comments On The Application," staff catalogued the comments of agencies that had commented on the application, as opposed to comments on the DEIS. The Public Service Commission's letter of comments on the DEIS are given extensive treatment (R. 4734-38). That letter did contain a basic conclusion (R. 4863): "It is evident that the FPC staff have sought to comply with the letter and the spirit of the National Environmental Policy Act of 1969." The PSC stated that none of the points raised in its comments were fatal to Commission approval of the transmission line (R. 4866).

Greene County's argument that staff's EIS amounts to a brief, therefore, has no basis. The foregoing demonstrates that objective commentators found it proper and squarely within the requirements of NEPA.



F. Staff Independently Analyzed The Proposed Action.

Greene County argues (Gr. Co. pp. 57-60) that in preparing the FEIS staff failed to comply with Greene County I, supra, and Commission Rules in that it relied on the work of others and did not independently analyze the proposed action.

Greene County's suggestion (Gr. Co. p. 57) that staff was precluded from relying in part on data developed in the hearing process prior to Greene County I, supra, has no basis. Expert testimony which has withstood the test of cross-examination provides a legitimate source of information for staff in its preparation of any impact statement.

Greene County (Gr. Co. pp. 57-58) also complains of staff's use of certain data supplied by PASNY and other members of the utility industry. Such information, however, is hard data which is reported to the Commission. It does not represent the judgment or analysis of the reporting party, but rather physical events. Greene County does not allege that such factual data is inaccurate. It suggests, however, that staff's use of it was improper. However, such use was fully proper, for staff did nothing more than exercise its independent judgment on the basis of such hard data.

A reading of Dr. Jessel's testimony at R. 1691-93 in no sense supports the inference made by Greene County (Gr. Co. p. 58) that the judgment of

others was blindly accepted. Dr. Jessel is a man of impressive academic background and professional experience (see R. 1141-1163). His testimony at R. 1691-93 demonstrates the fact of his independent expert analysis of this proceeding.

Moreover, Greene County's selective and very limited recitation of apparent examples of staff's lack of specific information (Gr. Co. p. 59) does not establish that staff failed to inform itself properly before making its independent analysis of the proposed action. Greene County's derogatory reference to staff "hiking trips" cannot obscure the fact that staff members visited Greene County on several occasions. They not only studied all alternative routes but consulted with and gathered information from State and local officials in New York.

There is no basis for Greene County's charge that staff did not independently analyze the proposed action. 12/ After gathering extensive factual data, staff exercised its own judgment in forming an opinion as to the Gilboa-Leeds line, and thus fully complied with Greene County I and the Commission's Rules.

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12/ This is demonstrated in substantial part by the fact that staff prepared numerous exhibits which are included in the record.



G. Specific Discussion Of A 765 kv Transmission Line Was Not Required

Greene County argues (Gr. Co. pp. 60-61) that the FEIS erroneously failed to deal specifically with the environmental impact of a 765 kv transmission line. This argument (discussed at length in Pt. V. A., supra) fails because the Commission has not given PASNY authority to build a 765 kv line between Gilboa and Leeds. As demonstrated, Chelsea v. Postal Service, supra, is inapposite because an effort was there made to segment a single proposed project.

In this case, the Commission has authorized nothing more than a single circuit 345 kv transmission line. If in the future the Gilboa-Leeds line is upgraded to 765 kv, it will be as a result of a separate proposal which will have been specifically authorized by the public agency with licensing authority over such a proposal. The recent Supreme Court decision in Kleppe v. Sierra Club, supra, is clear authority for the Commission's determination that the FEIS here was not required to discuss the special impacts of 765 kv transmission.

H. The Commission Has Complied With The Mandate  
Of Greene County I And Has Met The Requirements  
Of NEPA.

As noted by this Court in Greene County II, supra  
(490 F.2d at 258):

The conflict between our nation's seemingly insatiable demand for energy production and its parallel concern for the preservation of its wildlife and natural resources has created a mass of litigation. \* \* \* However, the fact that this conflict is substantial and that its resolution may have far-reaching effects does not mean that decisions regarding the conflict must be prolonged beyond reasonable limits.

The Court went on to hold that the Commission, in preparing an environmental impact statement in this case, met its statutory obligation and complied with the mandate of Greene County I, supra.

The Commission believes that it has (as demonstrated supra) met the requirements of NEPA in deciding to license the Gilboa-Leeds line. It has fully considered the unavoidable environmental impact of its action and has gone to great lengths to assure the mitigation of that impact. Because the Commission has complied with NEPA and reached its decision on the basis of substantial record evidence, its orders here on review should be affirmed in full.



VI. Petitioners Are Not Entitled To An Award Of Expenses Associated With This Proceeding.

Petitioners claim that the Commission erred in refusing to award them expenses associated with this proceeding. We submit, however, that the Commission's decision was wholly correct for two independent reasons. In the first place the Commission properly found that any provision for financial assistance to intervenors, indigent or otherwise, must come from the Congress. In any event, even assuming that the Commission now has the statutory authority to make such an award, the Commission correctly found that petitioners herein failed to qualify.

A. The Commission Does Not Have The Authority To Award Expenses And Fees Of Intervenors.

In Greene County I, supra, this Court examined the Commission's enabling act in response to the instant petitioners' requests for payment of fees. The Court stated (455 F.2d at 426):

[W]e perceive no basis in the terms of the provision[12/] to extend the Commission's power to include paying or awarding the expenses or fees of intervenors. We would need a far clearer congressional mandate to afford the the relief requested, especially in dealing with counsel fees, when Congress has not hesitated in other circumstances explicitly to provide for them \* \* \*[Footnote added]

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12/ Specifically, Section 309 of the Act, 16 U.S.C. §825h, which empowers the Commission "to perform any and all

(Footnote continued on following page)

Little has transpired since Greene County I to call this interpretation into question. To the contrary, the United States Supreme Court in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), reversed the lower court's award of fees to litigants that the lower court determined had acted as private attorneys general in vindicating important public interests. The Supreme Court held that absent specific statutory authorization, it would be inappropriate for the Courts to reallocate the burdens of litigation. 421 U.S. at 247.

Alyeska has been followed with respect to awards of fees in the administrative agency context. In Turner v. FCC, 514 F.2d 1354 (D.C. Cir. 1975), the court reviewed a decision of the FCC that it had no authority to require a license applicant to reimburse the fees of intervenors. The court affirmed, finding that the reasoning of Alyeska (514 F.2d at 1356):

\* \* \* is fully applicable to litigation before the Federal Communications Commission. Congress has no more delegated a "roving commission" to the FCC than it has to the Judiciary "to allow counsel fees as costs or otherwise whenever the \* \* \* [Commission] might deem them warranted.

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12/ (Footnote continued from previous page)

acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of the Act." The Court also held that Section 314(c) of the Act, which authorizes the Commission to employ attorneys, only authorizes such employment for the performance of the Commission's own work. 455 F.2d at 426-27.



While Turner involved the question whether the FCC was statutorily empowered to shift the costs of litigation among private parties, the Court in Fitzgerald v. Civil Service Commission, 407 F.Supp. 380 (D.D.C. 1975) found Turner controlling in a case involving the instant question: whether a federal agency can be required to reimburse a litigant for costs and fees. Applying Turner, the Court directed its inquiry to the question whether the Civil Service Commission was statutorily empowered to make the award -- a question that in the case of the Federal Power Commission has been answered in the negative by this Court. 13/

The Supreme Court's reasoning in Alyeska is relevant not only for its emphasis on statutory authorization, or lack thereof, to award fees, but also for the policy considerations underlying the decision. The Court expressed the fear that creation of a right to fee awards would lead to courts "picking and choosing" among different claims, awarding fees "depending upon the courts' assessment of the importance of the public policies involved in particular cases." 421 U.S. at 269. The Court also

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13/ Characterizing the rights involved in the case as "utterly basic, central rights--the right to make a living, and the right not to be treated arbitrarily by a government employer", 407 F. Supp. at 387, the Fitzgerald court analyzed the relevant statute and found the award of costs and fees by the CSC permissible.

recognized that an award of fees in Alyeska would open the door to awards in cases involving "a wide range of statutes [that] would arguably satisfy the criterion of public importance \* \* \*" 421 U.S. at 264.

These problems underlie the instant case, and illuminate the fact that it is for Congress in the first instance to decide whether, and under what circumstances, the Commission should be granted the authority to award fees and expenses. Petitioner's argument is that because they have prevailed in their position on route location, they have performed a public service worthy of the award of expenses.<sup>14/</sup> But if this were a basis for the award of expenses, there would be no workable distinction between petitioners herein and any intervenor that successfully presents a point of view to the Commission; at the very least, this Court will be called upon to assess the value of the instant petitioners' contribution in relation to those made by intervenors in numerous other FPC cases.<sup>15/</sup>

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<sup>14/</sup> This argument applies only to the Durham petitioners, who profess themselves satisfied with the Commission's adoption of transmission line Route B-1 (Durham, 2-3, 8-11). Greene County still objects to the route and did not point to any change benefitting the public caused by their intervention.

<sup>15/</sup> In one proceeding now being litigated before the Commission, requests for financial assistance filed by two towns, two individuals, and three organizations have been denied by the Commission. Power Authority of the State of New York, Project No. 2729, 50 FPC 1738 (1973). Two more such requests are pending in the case.



The Decision of the Comptroller General (Durham Add. A) and subsequent letter to the Chairman of the Oversight and Investigations Subcommittee (Durham Add. B) relied upon by the petitioners are not controlling. First of all, the Commission submits that the Comptroller General's attempt to distinguish the holdings of Alyeska, Turner and Greene County I from the question presented in the instant case is not persuasive. In Turner, as noted above, the court relied on Alyeska in holding that "Congress, and not the Commission, can authorize an exception to the 'American Rule' that litigants bear the expense of their litigation." 514 F.2d at 1356. We see no significant distinction between the Commission's authority to order a litigant to pay fees, and the authority of the Commission itself to pay the fees, absent a specific congressional provision allowing either.

In any event, the Comptroller General's decision is not authority for the argument that this Commission should be required to pay fees and expenses in the instant case. The Comptroller General said (p. 7), in distinguishing his opinion from the decision of this Court in Greene County I, "There is also no question of compelling NRC to pay the expenses of any of the parties." (Emphasis in the original). But, the question before this Court is precisely the question of compelling the Commission to award expenses. Since, as we show below (infra, Pt. VI, B), the Commission's decision not to award expenses is fully

supported by the record, not arbitrary, and not capricious; the holding of the Comptroller General that an agency in a proper case could award expenses is not relevant here.

A final consideration, not mentioned by the Comptroller General, is that although the Commission's appropriation act, like the NRC's, simply grants a lump-sum for "expenses necessary," P.L. 94-355, 90 Stat. 889, the appropriation is made only after a detailed budget, including expenditures for each of the Commission's various regulatory functions, is presented to, and defended before, Congress. The Congress has appropriated funds to the Commission for use in performing various specific functions, one of which is not to channel funds to intervenors for litigation before the Commission. Consistent with the basic rationale of Alyeska that a specific statutory provision allowing fees is necessary for authority to make awards, 421 U.S. at 260-63, and especially in view of current legislative activity in this area,<sup>16/</sup> we submit that the circumstances and extent of expense awards under the Federal Power Act is a matter neither for the Commission nor for this Court to decide. See Natural Resources Defense Council v. EPA, 512 F.2d 1351, 1357-58 (D.C. Cir. 1975).

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<sup>16/</sup> The Senate Judiciary Committee reported a bill, S. 2715, in the Congress just ended. See S. Rep. No. 94-863, 94th Cong., 2d Sess. (1976). The bill would have authorized all agencies to grant litigation expenses to intervenors, depending on the contribution of such intervenors to the decision-making process.



B. The Commission's Refusal To Award Fees To  
Petitioners Was Fully Supported By The Record  
And Within The Sound Exercise Of Its Discretion.

The Commission based its denial of petitioners' request for an award of fees and expenses not only upon its lack of statutory authority to make the award, but also upon the alternative ground that petitioners had not made a case for such an award.<sup>17/</sup> Opinion No. 751 states that even assuming that the authority exists to make an award, the petitioners (Opinion No. 751, R. 7319):

\* \* \*represent local towns and land owners who could conceivably have been damaged by the Gilboa-Leeds line. They had every right to present their cases as have countless other intervenors in cases before the Commission, who intervene for the benefit of local areas either because they do not desire the building of a hydroelectric project or pipeline or because they want it and the energy supplies made available. These intervenors are protecting their own interests \* \* \*.

The joint petition to intervene filed in this proceeding by the Durham petitioners stated that the Gilboa-Leeds line as then proposed "will traverse many miles through the Town of Durham and will affect scenic, historical and environmental values of the Town."

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<sup>17/</sup> Durham petitioners misinterpret the Commission's finding on this point, claiming that Opinion No. 751 opines that petitioners did not "make a case" in this proceeding (Durham 20, 23, 25). To the contrary, both the Initial Decision and Opinion No. 751, as Durham points out, quote from petitioners' witnesses on routing alternatives. On the fees and expenses issue, the Commission held that petitioners had not made a case for an award (Opinion No. 751, R. 7319).

(R. 5724). As to the Association for the Preservation of Durham Valley, the petition stated that membership therein included "over 100 members who own in the aggregate over 5,000 acres of land in Durham Valley and its immediate vicinity" (R. 5724). In addition, the joint petition stated as to eight individual intervenors<sup>18/</sup> that each "owns property in Greene County, New York. They own in the aggregate over 800 acres of land. The proposed Gilboa-Leeds line will either cross directly over their land or will be in the immediate vicinity thereof" (R. 5725).

Not surprisingly, witnesses and exhibits presented on behalf of these petitioners attacked Routes A or A-1, which would have passed through the Durham Valley (R. 7106). The Commission was clearly correct in concluding that petitioners were primarily protecting their own interests, and should not be rewarded simply because they have done so successfully. Petitioners' reliance on two standing cases (Office of Communications of United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966), and Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2nd Cir. 1965)), in support of the contention that the Commission's

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<sup>18/</sup> Somewhat mysteriously, these eight individuals, who were represented by counsel for the Town of Durham and the Association at all stages of the proceeding including the application for rehearing (R. 7333), are not represented on appeal. The individuals are Brooks Atkinson, Alfred Gellhorn, Marshall Bell, Walton McClure, Arthur Goldschmidt, Earl Morse, Agnes O'Neil, and Barry H. Garfinkel (R. 7537).



conclusion is "contrary to the concept of public interest participation before federal agencies" (Durham p. 19), is misplaced. If anything, these cases support the Commission's reasoning. In Scenic Hudson, this Court found that intervenor-petitioners (including three municipalities) had standing to challenge a Commission order precisely because of the "special interests" they sought to protect. 354 F.2d at 616. Among these interests were the aesthetic and conservation aspects of power development. Id. Significantly, in response to the Commission's fear that an expanded concept of standing would cause a crippling flood of interventions in Commission cases, the Court cited the expense of litigation as a limiting factor. Id. at 617. As the Court in Church of Christ stated, "Always a restraining factor is the expense of participation in the administrative process, an economic reality which will operate to limit the number of those who will seek participation \* \* \*." 359 F.2d at 1006.

Petitioners' argument regarding their qualification for litigation expenses under the Comptroller General's test (Durham Add. A p. 7) was not advanced to the Commission.<sup>19/</sup> Even were the rationale of the Decision relevant in the instant case, we submit that petitioners would not qualify.

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<sup>19/</sup> The Comptroller General's Decision was rendered after the Commission's issuance of Opinion No. 751 in January, 1976, although before Opinion No. 751-A in April, 1976.

The Decision proposes a two-part standard for agency use in testing requests for financial assistance, in a discretionary decision whether to award fees. The agency should find that:

(1) it cannot make the required determination unless it extends financial assistance to certain interested parties who require it, and where representation is necessary to dispose of the matter before it; and (2) the party is indigent or otherwise unable to finance its participation.

The record in this case shows that petitioners have not met this test.

Under part (1) of the test the agency must find that it cannot meet its statutory mandate unless intervenors are granted assistance--in the words of the Decision, where the agency "determines that it cannot make the required determination unless it extends financial assistance to certain interested parties who require it, and whose participation is essential to dispose of the matter before it \* \* \*." (Durham Add. A, p. 4). Petitioners argue (Durham p. 25): "There can be no doubt whatsoever that but for the active participation at the hearing by the Durham Petitioners and the Planning Board, the Gilboa-Leeds line would have been located along Route A-1". It is by no means clear from the record that this is the case. It was PASNY that originally proposed Routes A and B as alternatives for Commission consideration (R. 7046). PASNY's consultation with local agencies



and Commission staff led to modifications of Routes A and B, designated Routes A-1 and B-1, as well as alternatives C, D, and E, (Ex. 55-A, R. 7057). Greene County's own witness, the Planning Director of the Greene County Planning Department, testified that PASNY had consulted extensively with the Director and other local agencies as to location of the Gilboa-Leeds line. These consultations resulted in the development of Routes B, C, D, and E, (Tr. 3896-3961). The same witness also testified as to consultation with his Department by Commission Staff (T. 3975), and to the fact that members of the Staff had traversed, in the field, each of alternative routes A, B, C, D, and E. (Tr. 3976).

Although at the close of the record both Staff and PASNY favored their own modifications of Route A to Route B-1, the second choice of each was Route B-1. (R. 7058). Finally, the Presiding Judge's selection of Route B-1 was stated as follows (R. 7058):

I have concluded after a detailed examination <sup>3/</sup> and study of all the proposed routes and alternatives that Route B, as modified by PASNY, is the superior proposal with the least adverse environmental impact.

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<sup>3/</sup> Two inspection trips of the proposed routes were made by the undersigned in November 1971 and September 1973 with the aid, assistance and participation of all parties to the proceeding.

The most that can be said, then, for petitioners' hearing presentation is that it may have contributed to the

Judge's finding, but it cannot be said on the basis of the record that the Judge, and the Commission, would not have reached the same conclusion regarding the superiority of Route B-1 through consultation between and among Staff, PASNY, and local agencies, and the actual inspection of the proposed alternatives by the Presiding Judge. It follows that the first part of the test suggested by the Comptroller General has not been met, for the Commission could not have reasonably decided at the outset that petitioners' participation in this proceeding was essential to an adequate decision.20/

Under the second part of the Comptroller General's test, to qualify for an award of fees and expenses the intervenor must show that it is indigent or otherwise unable to bear the financial costs of participation in the proceeding. The fact is that petitioners have

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20/ Two of petitioners' items of "significant service", worthy of reimbursement, deserve notice. Costs and fees for successful prosecution of Freedom of Information Act cases (Durham p. 21) became available only with the 1974 amendments to the Act, P. L. 93-502, 88 Stat. 1561, long after petitioners' suit. Petitioners also cite Greene County I, which required the Commission to modify its procedures under NEPA. We note, however, the Supreme Court's suggestion in Aberdeen & Rockfish R. Co. v. SCRAP, 422 U.S. 289 (1975), that the timing of the preparation of the EIS mandated by this Court may not be required by the statute. 422 U.S. at 321 n. 20.



participated fully in this proceeding, beginning to end. Petitioners did not argue to the Commission on rehearing, and do not argue now, that for lack of funds they were precluded from fully presenting their respective cases. Durham, in fact, expresses its satisfaction with the case it has presented, and Greene County wants to reopen the record for further proceedings.

Durham petitioners state that uncontroverted evidence is in the record concerning the impoverished nature of the Town of Durham and the Association. The record shows that the Association, with over 100 members, at one point had \$50 in its bank account (R. 5948), and that in 1971 the Town of Durham appropriated \$800 for legal expenses, none of it attributable to the instant proceeding (R. 5948). The record is silent as to the financial resources of the eight individuals also represented by counsel for the Town of Durham and the Association. The record is also silent as to the resources of the members of the Association, except that among them they owned over 5,000 acres of land in Durham Valley (R. 5724).

The record does show, however, that the Town of Durham at some point contributed \$500 toward the expenses of this proceeding (R. 6185). And, the record reveals that Greene County has enjoyed a substantial financial benefit

merely from contesting this proceeding (R. 6183-86). The record, therefore, supports the Commission's reasoning that petitioners have participated in this proceeding primarily for their own benefit. The Commission submits that it is only fair that the parties who, in representing their own interests, succeed in protecting those interests, bear the cost of representation.



CONCLUSION

For the foregoing reasons, the orders of the Commission should be affirmed.

Respectfully submitted,

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October 18, 1976

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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Nos. 76-4151  
76-4153

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Greene County Planning Board, et al.  
Town of Durham, et al.,  
Petitioners,

v.

Federal Power Commission,  
Respondent,

Power Authority of the State of New York,  
United Brotherhood of Electrical Workers Local 1249,  
Intervenors.

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CERTIFICATE OF SERVICE

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I hereby certify that I have this day served printed copies of the Commission's brief in this case by mailing copies to counsel at the addresses listed on the attached Service List. Copies of the brief in xerox form were previously served and filed on October 18, 1976.

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Greene County Planning Board, et al.,  
CA-2 76-4151, et al.

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